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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITIBANK, N.A.,

Petitioner,

v.

WELLS FARGO ASIA LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AND THE INSTITUTE OF INTERNATIONAL BANKERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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November 22, 1991

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This brief is filed by consent of the parties pursuant to Rule 37.2.

Interest of *Amici Curiae*

The New York Clearing House Association (the "Clearing House") is an association of twelve leading commercial banks in the City of New York.[1] It clears

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[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank and Republic National Bank of New York.

commercial drafts and items in the New York area and operates two electronic payment systems, including CHIPS, the functioning of which lies at the heart of this litigation (*see* 13a-14a).[2] As of year-end 1990, of the total of 794 branches operated in foreign countries by all United States banks that are members of the Federal Reserve System, 418 were operated by Clearing House banks, and the total deposit liabilities in all currencies of the Clearing House member banks' foreign branches exceeded $150 billion. The Clearing House regularly appears as an *amicus curiae* in cases raising significant questions of law relating to banking.

The Institute of International Bankers is an association of more than 240 foreign banks, from over 50 countries, with operations in the United States. One of the Institute's principal objectives is to present the views of foreign banks operating in the United States on issues of federal and state laws and policies affecting those operations. To this end, the Institute has participated by filing briefs *amicus curiae* in cases raising significant legal issues that affect the United States operations of foreign banks.

The member banks of the *amici* organizations include most of the principal participants in international banking. The banks place and accept United States dollar deposits, commonly referred to as Eurodollar deposits, at thousands of locations outside the United States. Virtually all such deposits of any size are settled and cleared by these banks through CHIPS in New York.

Although the member banks of the *amici* have widely divergent economic interests as Eurodollar depositors or depositaries—and, indeed, various of them have substan-

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[2] Citations in the form "—a" are to the Appendix to the Petition.

stantial sums of blocked funds on deposit at Citibank/ Manila—they have a common and fundamental interest in the recognition and consistent application of clear and certain rules of law to the field of international banking. Because the decision below represents a radical departure from settled law that could cause considerable turmoil in the practice of international banking, *amici* urge its review and reversal by this Court.

Summary of Argument

The decision below would impose new liabilities with respect to hundreds of billions of dollars of interbank Eurodollar deposits based merely on the use for administrative convenience of routing instructions calling for the remittance of such deposits at maturity through New York correspondent banks via CHIPS. This Court having held that there was no basis in contract for such a result, the court of appeals has now found such a basis in the law of New York. The present decision presents the same conflict with federal law and policy and threatens the same untoward commercial consequences as did the earlier decision of the court of appeals. Both the process by which the decision was reached and its practical impact on federal banking regulation and international banking warrant review by this Court.

ARGUMENT

We shall not burden the Court by recanvassing the matters presented in the petition and in the prior submissions of Citicorp, the Solicitor General and these *amici*. Our February 24, 1989 brief in support of the petition in No. 88-1260 ("1989 Brief") and our January 18, 1990 brief on the merits ("1990 Brief") contain a full

discussion of the Eurodollar market, the CHIPS system and their roles in international finance and commerce, as well as the applicable law. We shall revisit those subjects only to the extent necessary in the context of the limited points we make here, which highlight the appropriateness of plenary consideration of this case.

A. The court of appeals answered the questions remanded to it for determination "in the first instance" (23a-24a) by holding that New York law applies and permits WFAL to collect its Manila deposits from Citibank in New York (6a-9a), thereby ignoring this Court's tactful suggestion that New York law seemed unlikely to call for such a result (*see* 24a). The court of appeals further held that the rule of New York law it fashioned did not conflict with federal bank regulatory law on the theory that federal law treats foreign branch deposits as noncollectible in the United States only if the deposit agreement expressly so provides (10a). In reaching this conclusion, the court of appeals apparently ignored entirely the representations of the Solicitor General, made on behalf of every responsible federal department and agency, that federal regulation is premised on the contrary view that under the branch-situs rule (*see* 32a) foreign branch deposits are, as a matter of law, collectible only abroad absent an express agreement guaranteeing collectibility in the United States.

B. The court of appeals predicated its holding at least in part on the customary settlement and clearance of Eurodollar transactions in New York through New York correspondent banks (7a), thus again attributing substantial decisional significance to the use of CHIPS and to the CHIPS routing instructions that this Court had already held did not, as a matter of contract, call

for collection in New York (21a-23a).[3] In relying on the use of New York correspondents to settle and clear as a basis for permitting collection, the court of appeals has completely eviscerated the branch-situs rule for large Eurodollar deposits and has made collectible in New York billions of dollars not booked in New York by the deposit-receiving institutions. The court of appeals did not discuss the public and commercial consequences of the result it reached, as presented to the court by the Solicitor General and these *amici*.

C. As we have previously advised the Court, the rule announced by the court of appeals severely burdens the international financial system and the United States banking system in particular:

1. Eurodollars play a critical role in international commerce due to the acceptance of the dollar as the principal currency of exchange among nations (1990 Brief 9-12). Eurodollar depositaries outside the United States—be they foreign banks or foreign branches of United States banks—have *never* treated those deposits as sited in New York and thus subject to collection in New York irrespective of their collectibility at the place of deposit. If the rule announced by the court of appeals is allowed to stand, there will be a disincentive to accept dollar deposits in countries presenting any perceived risk of government

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[3] Given the particular meaning of the locus of "repayment" as used by the district court—"the location where the wire transfers effectuating repayment at maturity were to occur" (17a), this Court distinguished the locus of "repayment" in this sense from the locus of "collection," *i.e.*, the place where WFAL "could collect" if "Citibank/Manila failed to remit payment upon maturity" (22a). The court of appeals effectively remerged these concepts as a matter of law.

action affecting remittances, interfering with the flow of funds in international commerce (*see* 1989 Brief 13-15).

2. United States banks at least, and perhaps foreign banks doing business in New York (*see* 7a-8a), will face new liabilities on account of foreign branch deposits, placing additional burdens on their capital and disadvantaging them in the Eurodollar market. The magnitude of these liabilities is massive: total dollar obligations of foreign branches of United States banks alone (excluding amounts due to affiliates) exceed $150 billion. 77 FED. RES. BULL. A56 (Nov. 1991).

3. Countries wishing to act adversely to the United States will have a ready road map to do so—they need only freeze the branch assets of our banks, disclaim any effect on depositors' rights (*see* 8a) and send the depositors here to collect. To state this result is to show its absurdity: no nation would make its banking system hostage by giving effect in its own courts to such action by a foreign government.

D. The decisional process of the court of appeals evades the purport of this Court's prior decision, disregards the Solicitor General's representations as to the reality of federal bank regulation, ignores the practical consequences of its choice of a rule of decision for United States banks engaged in international banking, and creates a New York common-law rule adverse to the interests of both New York and the United States. It is remarkable in its abstraction of legal rules from the reality of the world in which they are to be applied and in its postulation of a lack of conflict with federal law through intellectual sleight of hand. The Court recognized in its previous grant of *certiorari* that this case presents important questions of federal law and federalism; in its present

posture it warrants review again not only on that ground but by reason of the supervisory considerations adverted to in the last clause of Rule 10.1(a).

CONCLUSION

For the reasons stated herein, in the Petition and in the prior submissions of Citibank, the United States and these *amici, certiorari* should be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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